Supreme Court, U.S.
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No. 99-1085

IN THE

Supreme Court of the United States

ALAN LEVAN and BANKATLANTIC FINANCIAL CORPORATION,

Petitioners,

—v.—

CAPITAL CITIES/ABC, INC. and WILLIAM H. WILLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied this Court's precedents in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989) in conducting its independent examination of the record on the issue of actual malice?

LIST OF PARTIES BELOW

The parties to the appeal in the United States Court of Appeals for the Eleventh Circuit were as follows:

Alan B. Levan and BankAtlantic Financial Corporation were plaintiffs-appellees-cross-appellants.

American Broadcasting Companies, Inc. and William H. Willson were defendants-appellants-cross-appellees. In their petition for a writ of certiorari, petitioners incorrectly state that Capital Cities/ABC, Inc. was a party to the proceedings below. Petition ("Pet.") at ii. American Broadcasting Companies, Inc. was substituted as the corporate defendant at the outset of trial. R32-3.* It is that entity against which the district court's judgment was entered (*see* Petitioners' Appendix ("Pet. App.") at 27a-28a) and that entity that appealed to the Eleventh Circuit. R27-670.

RULE 29.6 STATEMENT

The Walt Disney Company, a publicly traded company, is the ultimate parent of American Broadcasting Companies, Inc. ("ABC"). ABC has no wholly-owned subsidiaries and issues no shares to the public.

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* References to "R_-_" are to the record below; the volume number is followed by the docket entry number and the page number where appropriate.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on September 29, 1999 should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

STATEMENT OF THE CASE

Procedural History

This action for defamation and invasion of privacy was commenced in February 1992 by Alan B. Levan ("Levan"),

the President, Chief Executive Officer and controlling shareholder of the holding company then known as BankAtlantic Financial Corporation ("BFC"), and BFC itself. R1-1. It concerns a segment of the ABC News television program "20/20" broadcast in November 1991 which reported on the public controversy concerning "rollups." The report was critical of rollups generally; it criticized the unfairness of the rollups effectuated by Levan and BFC specifically but was also clear to report that they were "all legal." R1-12, Ex.A.

Issue was joined in early 1992, R1-12, and discovery ensued. While discovery proceeded, three securities fraud actions, also pending in the Southern District of Florida and consolidated as *Purcell* v. *BankAtlantic Financial Corp.*, 89-1284-CIV (S.D. Fla.), proceeded to trial. These actions, each of which was filed before ABC's broadcast, had been commenced by and on behalf of investors who had been severely damaged by the Levan/BFC rollups, the very rollups reported on by ABC. R9-203-16. The investors claimed that the Levan/BFC rollups were fraudulent under federal securities law and state law. *Id.*

At the conclusion of a two-week trial, the *Purcell* jury determined that Levan and BFC had committed securities fraud. R15-320-Ex.B. Damages were awarded in the amount of $8 million. *Id.* In response to special interrogatories included as part of its verdict, the jury determined that the Levan/BFC rollups had been unfair to their limited partners and that Levan and BFC had knowingly misrepresented to them the fairness of the transaction. *Id.* The jury's verdict was widely reported both by BFC, in public filings, and by the press. R-27-688; *see* R26-637-65. Levan and BFC's motion for judgment as a matter of law was denied; judgment was entered for the plaintiff class and Levan and BFC appealed to the Court of Appeals. R15-320-Ex.B; *see* R13-276-Ex.B.

ABC then moved for summary judgment in this action urging that as a result of the judgment in *Purcell*, plaintiffs were collaterally estopped from contesting the substantial truth of ABC's broadcast reporting on the unfairness of the Levan/BFC rollups. The Magistrate Judge agreed and issued his recommendation that summary judgment be granted to ABC. Shortly thereafter, the two *Purcell* defendants offered to pay the plaintiff class the full amount of the verdict—dollar for dollar—plus interest, but only in exchange for an agreement to make a stipulated motion seeking vacatur of the jury verdict and the resulting judgment that Levan and BFC had committed fraud. The case settled on those terms. *Purcell* v. *BankAtlantic Financial Corp.*, 85 F.3d 1508, 1510 (11th Cir.), *cert. denied*, 519 U.S. 867 (1996).

On learning of the settlement, ABC moved to intervene in the *Purcell* action for the limited purpose of contesting the vacatur of the *Purcell* verdict and judgment for collateral estoppel purposes; the motion was denied. *Id.* at 1511.[1] Shortly thereafter, the *Purcell* verdict and judgment were vacated. R15-320-Ex.H.

On the basis of the stipulated vacatur, ABC's summary judgment motion was reconsidered and denied. R15-319; R16-362. The court also entered an order precluding any evidence of or concerning the *Purcell* verdict or any of the publicity surrounding it during the course of the then-upcoming trial in this action. R21-435.

In October of 1996 the trial began. At the close of plaintiffs' case in chief, defendants moved for judgment as a

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[1] ABC appealed from the denial of its motion to intervene; the denial was affirmed by the Eleventh Circuit, which ruled that ABC lacked standing to oppose the vacatur. *Purcell*, *supra*, 85 F.3d at 1513. This Court denied ABC's petition for a writ of certiorari to review that ruling. 519 U.S. 867 (1996).

matter of law dismissing the claims for false light invasion of privacy and punitive damages. R24-552. Finding that the false light privacy claim was wholly duplicative of Levan's libel claim and therefore barred under Florida law, the district judge dismissed the claim. R24-559. At the same time, the court dismissed plaintiffs' claims for punitive damages, finding that there was "no legally sufficient evidentiary basis for a reasonable jury to find that Defendants broadcast[ ] the 20/20 segment at issue with the 'primary purpose' of indulging in 'ill will, hostility and an intent to defame.' " R27-693-2.

At the close of the evidence, defendants moved for judgment as a matter of law on the remaining libel claim. R62-4436-37. The district court denied the motion, *id.*, and submitted the case to the jury. On December 18, 1996, the jury rendered its verdict for plaintiffs, awarding compensatory damages to Levan and his company in the total amount of $10 million. R26-610; R26-611. Defendants' post-trial motions for judgment as a matter of law or, in the alternative, for a new trial or remittitur were denied. R27-667-49; R27-668. Defendants timely appealed to the Eleventh Circuit. R27-670.

On September 29, 1999, the Court of Appeals issued its unanimous 31-page decision written by Judge Tjoflat. After carefully articulating the appropriate standards for conducting its independent review of the evidence on the issue of actual malice, the Eleventh Circuit proceeded to review the information known to ABC about the rollup transactions before the broadcast, most of which was undisputed. Concluding that plaintiffs had failed to carry their burden of proving actual malice by clear and convincing evidence, the Court of Appeals vacated the district court's judgment and directed that judgment be entered for defendants.

Given that ruling, the court did not reach ABC's other claims of error. *See* Opinion at 15a n.24.

Statement of Facts

During the early 1980s, Levan and I.R.E. Financial Corporation (the predecessor of BFC) became national leaders in the selling of commercial real estate partnerships to the public. D.Ex. 89 at 2.[2] According to Levan, these public partnerships "were designed to allow little investors to participate in real estate just like the big guys." P.Ex. 76 at 1. Sales literature sent to prospective investors repeatedly promised them that it was anticipated that the partnerships would acquire and hold commercial real properties for a period of between four and six or seven years. D.Exs. 87 at 4, 496 at 11, 498 at 11, 511 at 11; R36-551-52. After that time, the literature asserted, it was expected that the properties would be sold and the sale proceeds distributed among the partners. D.Ex. 87 at 3, 496 at 10, 498 at 11, 511 at 10.

The structure of each public partnership was basically the same: a wholly-owned subsidiary of I.R.E. served as the corporate managing general partner together with individual general partners who were employed by or affiliated with I.R.E. Levan, who was chairman and president of I.R.E., served as an individual general partner for each of the limited partnerships. D.Ex. 277 at 3, 16, 26; D.Ex. 497 at 3, 16, 39. As in all limited partnerships, the limited partners were to have (and had) no role in the management or operations of the partnerships. D.Ex. 89 at 7.

Toward the end of the 1980s, Levan acquired a controlling interest in a struggling Savings and Loan which he renamed BankAtlantic. D.Ex. 1013 at 2-3. He changed

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[2] References to D.Ex. and P.Ex. are, respectively, to defendants' and plaintiffs' exhibits admitted in evidence at the trial.

I.R.E.'s name to BFC and made BFC the holding company for the S & L. *Id.*

Notwithstanding that Levan well understood that his limited partners anticipated that the real estate their partnerships were buying would be "liquidated" after a few years and their capital returned plus profits, P.Ex. 1143; R36-556, in 1989 BFC proposed an unusual rollup transaction. P.Ex. 223. The 337-page offering prospectus proposed that the limited partners exchange their short-term interests in the real estate in which they had invested for long-term unsecured subordinated debentures of BFC. *Id.*

As described in BFC's prospectus, under the terms of the proffered deal, the properties, cash and other assets originally held by the partnerships (with an appraised value of over $46 million net of debt) were to be transferred to BFC. *Id.* at 51, 64-65. The limited partners were to be issued 20-year unsecured subordinated debentures in BFC that had a face value of $30 million, representing approximately 65 percent of the appraised value of the limited partners' equity in their holdings. *Id.* at 64-66. The limited partners were told that Alan Levan, BFC, and the managing general partners believed the exchange was "fair" to the limited partners. *Id.* at 47.[3] After a consent solicitation period, a majority of limited partners in each of the three partnerships voted to accept the transaction. R57-3656.

Within two years, no meaningful market had developed for the debentures, which by then had traded for as little as 14.3 percent of the "exchange value" of the limited partners' assets acquired by BFC in the rollup. P.Ex. 458 at 16-17. By then, the *Purcell* actions had been filed against

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[3] It was this representation that the jury in the *Purcell* case, *supra*, found to be false since the representation was made when BFC and Levan "knowingly believed otherwise." R15-320-Ex.B.

Levan and BFC by their limited partners who believed that they had been betrayed by Levan's corporate self-dealing.

ABC's Newsgathering Activities

In the summer of 1990, ABC News received a letter from a viewer complaining bitterly about the use of rollups. D.Ex. 84. Senior Producer Meredith White concluded that the issue merited investigation and assigned Bill Willson, a veteran and award-winning "20/20" producer, to conduct further inquiries. R43-1701; R57-3726-27. John Stossel, also an award-winning journalist, was assigned as on-air correspondent. R57-3747. In the course of their research, Mr. Willson, Mr. Stossel and their staff of journalists came to learn of the Levan/BFC rollups and the claims in the *Purcell* litigation that those rollups were fraudulently perpetrated on investors. R43-1718.

As the Court of Appeals would later note, in conducting their investigation, ABC's journalists turned to "a wide variety of sources." Opinion at 6a; *id.* at 12a. Literally thousands of documents were collected and read;[4] scores of sources were contacted and interviewed;[5] three hearings before Congress and one before the Securities and Exchange Commission were observed and recorded;[6] litigation files and depositions were obtained and reviewed;[7]

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[4] *See, e.g.*, R42-1463; R43-1711-14, 1725; R53-3008-24; R54-3079-88, 3106-14, 3121-25, 3130-33, 3229-30; R57-3766-74; R58-3896-97.

[5] *See, e.g.*, R43-1716-21, 1725, 1806-08; R53-2947-48, 2953-56; R54-3089-99, 3133-37.

[6] *See, e.g.*, R43-1726; R53-2957-61, 2975, 3010-11; R54-3085-88, 3134, 3168; D.Exs. 339A-F, 225, 238, 244, 245, 246, 249, 259, 356.

[7] *See, e.g.*, R43-1721; R54-3123-25, 3130-33; D.Exs. 263, 264, 266, 267, 268, 269.

expert after expert was consulted.[8] There could be no claim in this case—and there was none—that ABC published its news report without having made an extensive investigation of the facts.

In preparing the broadcast, ABC interviewed and read analyses of the Levan/BFC rollups from a wide array of disinterested experts and outside observers of the deal. What the journalists were told by these individuals, all of whom were unconnected with the transaction (as either general or limited partners), was that the rollups were not only controversial but fundamentally unfair. For example, ABC learned:

From Press Reports and Financial Publications:

* That rollups generally were the subject of intense and continued criticism in the local, financial and national press, that the topic of rollups was under consideration by three Congressional subcommittees and that reform legislation was being actively considered by Congress and by several states. *See*, *e.g.*, D.Exs. 1A, 1B, 11A, 11C, 11D, 13A-C, 15, 17, 18, 24, 25, 29, 32-35, 39, 162.

* That the BFC rollups specifically were the target of sustained criticism in the Miami press and other financial and general circulation publications across the country. *See*, *e.g.*, D.Exs. 101A, 137C, 144, 148, 172, 353A, 359D, 359E, 359I.

* That as of 1991, BankAtlantic (Levan's savings and loan and BFC's principal asset) had suffered massive losses for three straight years, that it was in default of federal capital requirements at the end of 1990 and was sorely in need of cash, that it was operating under a supervisory

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[8] *See*, *e.g.*, R43-1712-14; R53-2998-3005; R54-3079-84, 3133-34; R58-3854-55, 3857-59.

agreement with federal regulators, and that BFC itself was reporting enormous losses throughout the entire period of the proposed rollup. *See*, *e.g.*, D.Exs. 97, 100B, 101A, 144, 147L, 387.

* That the first of the Levan/BFC rollups, accomplished in 1989, had fared so badly for investors that their $30 million in debentures had a market value at the time of the broadcast of less than $6 million, that Levan and his companies had netted over $17 million from the sale of only some of the properties obtained from the limited partners in the 1989 rollup, that Levan had immediately "pumped" more than $7 million into BankAtlantic and that Levan and BFC had been sued for securities fraud over the transactions. *See*, *e.g.*, D.Exs. 144, 148, 172, 359E, 359I.

From Members of Congress:

* While the *Purcell* suit was pending, Congress began investigations of the rollup phenomenon, holding extensive hearings in both Houses. One hearing, by the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations, focused exclusively on the Levan/BFC rollups. P.Ex. 103 ("Hearings").[9] At those Hearings, which were attended by producer Willson and his camera crew, not a single disinterested individual defended Levan's rollup. Chairman John Dingell observed that Mr. Levan had advised the Subcommittee that in 1988 and 1989 a Florida bank "could not get a loan anywhere," that Mr. Levan had found "innovative solutions" to deal with this problem, one of which was his "novel rollup scheme," that the rollup

[9] Legislation was later adopted by Congress designed to assure that transactions such as the BFC rollup, which did not permit dissenting limited partners to cash out if they did not wish to participate in a rollup, never occurred again. *See* Limited Partnership Rollup Reform Act, Pub. L. No. 103-202, Title III, 197 Stat. 2359 (1993), D.Ex. 1139.

resulted in "large underlying real estate holdings [being] siphoned off from the benefit of the investors" leaving the investors with debentures in [BFC] "whose only real asset was a troubled bank," that "the best real estate was then immediately sold off" and used as "a cash infusion to help the bank" and that it appeared that "the assets of the limited partners were used to prop up the bank." Mr. Dingell remarked that it was "possible that the entire scheme may have been perfectly legal, which makes it far worse from a standpoint of public policy." *Id.* at 1-4.

* Representative Rowland, second ranking majority member of the Subcommittee, observed that the debentures issued in the 1989 rollup were worth "significantly less than the real estate and other assets the limited partners gave up," that it "appear[ed] that the holding company needed money badly and the bank also needed capital," and that it also appeared that "Mr. Levan's holding company and the bank got the better end of this deal." *Id.* at 11-12. *And see id.* at 4 (critical remarks by ranking minority member Representative Bliley, quoted at p. 17, *infra*).

From Congressional Investigators:

* At the Hearings, Bruce Chafin, Special Assistant to the Subcommittee, testified that as of July 1991 the $30 million in debentures issued in connection with the 1989 rollup were worth $6 million at most and perhaps even as little as $3 million, that BFC netted approximately $17 million from the sale of nine of the 17 properties it obtained by virtue of the 1989 rollup alone in addition to $3 million in cash formerly held by the limited partnerships, and that as of July 1991 the actual value of the nine properties already disposed of by BFC was at least three times the market value of the debentures. *Id.* at 11-12.

* Thomas C. Montgomery, Minority Counsel to the Subcommittee testified that "[w]ithout its rollups [BFC] would not have had the capital it needed to finance the bank," that

> [i]n the conflict between Mr. Levan's fiduciary responsibilities as chairman and chief executive of [BankAtlantic S&L] and of the holding company [BFC] and managing and individual general partner of the real estate limited partnerships, the needs of the bank appear to have prevailed over his responsibility to the partnerships. . . . It appears the firewall between the competing interests failed and the investors got burned.

Id. at 7-9.

From Federal Regulators:

* Timothy Ryan, Director of the Office of Thrift Supervision, testified at the Hearings that "most of [BFC]'s revenues came from the rollup activities," that BankAtlantic was a "troubled" institution and that if the $7 million obtained by BFC from the sale of the properties in the 1989 rollup had not been downstreamed to the bank, "then [the thrift] would not be in compliance with its capital requirements." *Id.* at 118, 119, 121.

* James R. Doty, the General Counsel of the Securities and Exchange Commission, testified at the same Hearings that grounds existed for criticizing the BFC rollup including that the transactions presented substantial conflicts of interest, that the investors were not offered the opportunity to consider alternative transactions, that the debentures were unsecured, speculative and substantially below the appraised value of the property and that the debentures had traded at only a small fraction of their face value, in some cases as low as 14.3% of the exchange value. *Id.* at 86.

From Limited Partnership Experts:

* Spencer Jeffries, one of the leading experts on real estate limited partnerships, in a study of the BFC rollups published in January of 1991 and reviewed by Mr. Willson prior to the broadcast, wrote that the bonds being issued were undervalued in comparison to the value of the real estate being "exchanged," that the market would likely reduce the value of the BFC debentures "to sheer rubble," that "many analysts familiar with the BAFC exchange offer consider[ed] the rollup an obvious attempt on the part of BAFC to increase its cash position to enable it to infuse much needed capital into struggling BankAtlantic," and that after only a "short while" BFC debenture holders "will likely have an intense desire to dust off their souvenir rollup prospectus and have it tightly wound on a roll for a more practical and decidedly appropriate use." D.Ex. 1167; R43-1713; R59-4034-54, 4079.

* Robert Stanger, considered the other leading commentator in the country on limited partnerships and a trustee of a *general* partner association, who was interviewed precisely because ABC thought "he might defend the rollup because he does defend rollups," R58-3855, told ABC that Levan was using the assets of the limited partners "to support an institution in which he earns all the upside," that the BFC debentures were "not ranked by credit agencies," and that he wouldn't vote for the transaction if he "were a limited partner." D.Ex. 339T.

From Securities Analysts:

* John Lynch, senior evaluator of taxable securities at J.J. Kenny, told ABC that investors should "STAY AWAY" from the BFC bonds, that there was no market for them, that the BFC bonds weren't even rated and were "toilet paper" and "garbage." D.Exs. 986, 1161; R44-2018-20.

* Joe Bencivenga, Deputy Director of Equity and High-Yield Research at Salomon Brothers, told ABC that BankAtlantic "should have been under RTC management 6 months ago," that "the debentures won't pay interest much longer," that "their long term maturity was a device to increase the bank's equity position," and that it was very fair to refer to the debentures as "junk." D.Ex. 986; R44-2021-22.

* Ed Markel, vice-president of First Miami Securities, told ABC that the BFC bonds were "junk" and that he wouldn't recommend them to his customers. D.Ex. 986; R44-2022-23.

* Of the six industry sources consulted by Mr. Willson, including Mr. Jefferies, Mr. Lynch, Mr. Hynes and all three of the firms purportedly making a market in the BFC bonds, two said that it was fair to characterize the bonds as junk; four said that they weren't even good enough to be referred to as junk. D.Ex. 1161; R53-3000-05.

From the Bond Market Itself:

* Finally, as Mr. Stossel testified, ABC's journalists were acutely aware that the bond market itself had such a poor view of the debentures that there was little if any market for them at all, and that the bonds, if they could be sold, would likely command no more than 20 cents on the dollar. As Mr. Stossel remarked, the price of a bond is itself "information." "This was thousands of people who put their money where their mouth is saying that this is bad news, this is a bad deal." R58-3868.

All this information, mutually supportive and utterly consistent, was known to the ABC journalists before the broadcast. No objective observer, no independent expert, no government official, no federal regulator offered any defense of the Levan/BFC rollups to ABC. As Mr. Stossel,

the correspondent for the report and the principal author of its script, testified:

> Every expert we talked to used phrases like: This is a good thing to leave in the glove compartment of your car for roadside emergencies. Usually you get two opinions about a story like this. *In this story, everywhere we turned people said that this was a bad deal.*

R58-3968 (emphasis added); *see id.* 3928-29. This critical testimony as to ABC's state of mind was totally uncontroverted by plaintiffs.

Arrayed against this mountain of critical information were two decidedly unobjective defenders of the Levan/BFC rollups: Alan Levan and his lawyer, Eugene Stearns. Although, as the Eleventh Circuit noted, Opinion at 23a n.36, Levan would later—and quite significantly—concede at trial that reasonable people could disagree as to the fairness of the transaction, R39-959-60,[10] in a lengthy meeting with producer Willson, Levan and Stearns denounced critics of the rollup and defended the transactions as "the best in the industry [and] extremely fair." R35-358. After months of negotiations and numerous efforts by Stearns to persuade ABC News executives to abandon their report, Levan declined to participate in an on-camera interview. P.Ex. 308A.2. Levan instead retained a public relations firm to assist him in preparing a videotape which he submitted to ABC defending the rollups. R39-964; P.Ex. 196. He also appeared before Chairman Dingell's Subcommittee but declined to have his testimony filmed by ABC's crew, invoking a House rule that permits witnesses to bar the audio or video recording of their testimony. R56-3548-49; P.Ex. 103 at 146-47.

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[10] Levan's paid expert, Steven Goldstein, and his counsel, during summation, both made the same concession. Opinion at 23a, n.36.

The Broadcast[11]

On November 29, 1991, ABC broadcast its report on rollups. Over video of the Miami skyline, anchor Barbara Walters opened the report as follows:

> In the 1980s, many people wanted to get rich quick in real estate, but what if you were a small investor who didn't really know how the game was played? Well, why not put your money in the hands of professionals? The smart money crowd knows how to parlay an investment into handsome returns. Tonight, John Stossel tells us of people who did just that, only things didn't quite work out as they planned.

P.Ex. 5 (Broadcast Transcript) at 6 (App. 3a).

The viewer was then introduced to Mr. Levan: "Miami, Florida has been good to a kid who started out with little and made it big here in real estate." *Id.* Pictures of Levan's estate and grounds were shown as Mr. Stossel described his success in the real estate and banking businesses. More broadly, the report went on to explain the growth of real estate limited partnerships in the 1980s generally and the nature of limited partnerships as an investment mechanism for smaller investors. It noted that more than 30,000 investors had invested more than $230 million to participate in partnerships sponsored by I.R.E. and explained to viewers that when "the boom burst" in the real estate market in the 1980s and "a change in the tax laws made things even worse," the value of the real estate held by partnerships such as Levan's diminished for reasons unconnected with Levan. What Levan did, the report said, was not "to sell the real estate and split the proceeds with the

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[11] Our description of the broadcast is necessarily truncated. For the convenience of the Court, the transcript of the broadcast has been reprinted in the Appendix ("App.") hereto.

investors" but to propose a rollup—and that, said Stossel, is "what this story is about." *Id.* at 7 (App. 5a).

After reporting about investor anger over rollups other than those proposed by Levan, *id.*, Mr. Stossel explained what a "rollup" is.

> *Stossel*: What is a rollup? It's simply an exchange of one investment for another. Instead of selling the real estate and giving limited partners their share, the general partner, supposedly acting in the interest of the limited partners, exchanges that investment for another, usually a stock that's traded on a stock exchange. There's nothing wrong with this if it's a fair exchange. The problem is that many rollups done so far have been bad deals for the limited partners.

Id.

Turning to the BFC-Levan transactions—"now let's look at Levan's rollup"—the broadcast explained how the limited partners' original investment in real estate had been transformed into a long-term interest in a bank holding company. "For many of the people [who invested]," Stossel said, "the amount printed on the bond was half of what they initially invested," with some investors being promised even less.

> *Stossel*: Of course some of that loss is expected. Much of Levan's real estate lost over half of its value. That wasn't Levan's fault and Levan's limited partners did get some cash payments in early years. But what's remarkable about Levan's rollups is that while he got cash for the properties, these bonds he gave them aren't worth the amount printed on them.

Id. at 7-8 (App. 5a-6a). In fact, as the broadcast went on to report, the debentures were then worth "only 20% of what's printed on the bond." *Id.* at 8 (App. 7a). Echoing the

testimony given, under oath, by the Subcommittee staff and others at the hearings devoted to the BFC-Levan rollups and information confirmed without exception by every one of more than a half-dozen experts in the valuation of bonds consulted by ABC, the broadcast continued:

> *Stossel*: You've heard of junk bonds? This is perceived as real junk.

Id.

Critical views of the rollup were then offered by Roy Henry, a financial planner who "helped sell Levan's deals" and was instrumental in instituting the *Purcell* litigation, and then by investors who voted against the rollups—all the time making clear that a majority of the investors had nonetheless voted to approve the exchange. *Id.* at 8 (App. 7a).

Efforts undertaken to persuade Levan's limited partners to approve the rollups were then reported followed by critical comments by Mr. Henry and Roz Lamb, one of Levan's limited partners. *Id.* at 8-9 (App. 8a-9a). Portions of Levan's videotaped statement submitted to ABC were then broadcast, including his claim that "[a] majority of the partners voted to accept more risk for the possibility of greater return." *Id.* at 9 (App. 10a). After noting that Levan had chosen to prohibit television coverage of his own testimony before Congress (invoking a House of Representatives Rule), the broadcast advised that Congress was then considering new rules for rollups and reported Representative Bliley's comments at the Hearings that:

> *Rep. Bliley*: There appears to be only one winner here—Alan Levan. It is clear that the limited partners, the real estate investors, have not benefited nor are they likely to.

Id. at 9-10 (App. 11a).

The report concluded with the following summary:

> *Stossel*: [voice-over] Levan's rollup is just one of many done recently where the general partner seems to have done better than his limited partners. The general partner does have the power. It's something to think about next time someone says, "Give me your money. We'll be partners."

Id. at 10 (App. 11a).

A month after the broadcast, Mr. Stearns sent ABC a letter complaining about various statements in the broadcast and making a formal demand for a retraction. P.Ex. 14. In response, ABC undertook a review of the broadcast and determined that it should be clarified in three respects. Opinion at 14a n.22. The clarification was aired on the "20/20" program of January 10, 1992. P.Ex. 722. Notwithstanding the broadcast of the clarification, this litigation was filed against ABC and its producer Bill Willson shortly thereafter. R1-1.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION PRESENTS NO CONFLICT AMONG THE CIRCUITS

In their attempt to manufacture a split among the Circuits, petitioners claim that the court below "held" that the "independent review" mandated by this Court in public figure libel cases extends beyond the issue of "actual malice" to include the issues of "gist" and "falsity" as well. Pet. at 17. According to petitioners, this supposed "holding" conflicts with decisions of "the Third, Fifth, Eighth and Ninth Circuits." *Id.* But the Eleventh Circuit made no such ruling.

On the subject of independent review, the court did offer the unexceptionable conclusion that:

> Our standard of review in libel cases in which the actual malice standard forms part of the jury charge is higher than in other cases. We are required to make an "independent examination of the entire record," *New York Times*, 376 U.S. at 285, 84 S.Ct. at 729, *to determine whether the evidence offered at trial supports a finding of actual malice.*

Opinion at 16a-17a (emphasis added). No ruling of any Court of Appeals differs with that much-repeated articulation of one of the central holdings of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[12]

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[12] In fact, it is difficult to understand how petitioners could seek to rely on the cited decisions of the Third, Eighth and Ninth Circuits for the proposition that they articulated a standard of independent review different from that articulated by the Eleventh Circuit when none of those cases involved an independent review of the issue of actual malice at all. In *Schiavone Construction Co.* v. *Time, Inc.*, 847 F.2d 1069, 1089-1093 (3d Cir. 1988), the issue was whether there was sufficient evidence of actual malice to preclude summary judgment for defendant; the doctrine of independent review is not even mentioned in the opinion. *Lundell Manufacturing Co.* v. *American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), did not involve a public figure plaintiff, and the court therefore was not called upon to, and did not, consider the standard of review for an actual malice determination. In *Kaelin* v. *Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), the issue was, again, whether plaintiffs' claim could survive a motion for summary judgment; the doctrine of independent review was also not implicated or addressed. Petitioners' effort to establish that the Fifth Circuit is in "conflict" with the decision below is equally unpersuasive. The analysis conducted in *Peter Scalamandre & Sons* v. *Kaufman*, 113 F.3d 556 (5th Cir. 1997), was precisely the same as that conducted by the Eleventh Circuit here. The court examined the statements at issue to determine whether there was sufficient proof in the trial record that they were published with actual malice and held that there was not, reversing the jury's determination. *Id.* at 562, 564.

As for the Court of Appeals' determination as to the gist of the broadcast, the court—also unexceptionably—observed that the question was one of fact, but one which was necessarily "intertwined with Levan's allegations of actual malice, which we must subject to independent review." Opinion at 18a n.29. Again, the legal proposition that the determination as to actual malice is one subject to independent review stems from *New York Times Co.* v. *Sullivan* itself. To make that determination, the court must necessarily first address the gist of what was said.

As the Eleventh Circuit correctly recognized, Florida law, which applies in this diversity case, requires just such an examination of the "gist" or "sting" of a challenged publication.

> Under Florida law, a statement is not defamatory unless the "gist" or "sting" of the statement is defamatory. *See Smith* v. *Cuban Am. Nat'l Found.*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999). The gist of any statement within a publication or broadcast is found only by reference to the entire context. See *Byrd* v. *Hustler Magazine Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed. 2d 447 (1991). Our first job, therefore, is to determine the gist or sting of the report.

Opinion at 18a (footnotes omitted).[13] Petitioners' suggestion that this doctrine—rooted in state law—is somehow

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[13] *See Smith* v. *Cuban American National Foundation*, 731 So. 2d 702, 705 (Fla. Dist. Ct. App. 1999) (per curiam) ("There is no way to determine the 'gist' or 'sting' of the publication in the mind of the average viewer without examining the statement in context . . . . Under the substantial truth doctrine, a statement does not have

inconsistent with or antagonistic to the actual malice inquiry is itself inaccurate for two distinct reasons. First, it rests in the first instance with Florida to determine the nature of its own libel law. No federal interests bar a state from making its libel jurisprudence more or less demanding—so long, that is, as it does not conflict with the First Amendment. *See, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

Second, the pre-existing relationship between Florida libel law and First Amendment law has already been sanctioned by this Court. In *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), cited by the Eleventh Circuit, this Court said the following of California's identical test:

> As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in details." 5 B. Witkin, *Summary of California Law* § 495 (9th ed. 1988) (citing cases). . . . Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." *Heuer* v. *Kee*, 15 Cal.

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to be perfectly accurate if the 'gist' or 'sting' of the statement is true."); *McCormick* v. *Miami Herald Publishing Co.*, 139 So. 2d 197, 200 (Fla. Dist. Ct. App. 1962) ("A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." The court found that after eliminating the parts of an article alleged to be false, the article "would not have produced a different effect, as the common mind would naturally understand them"); *Woodard* v. *Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. Dist. Ct. App. 1993) (finding that "[t]he fact that [the driver] actually spent two years in prison, as opposed to the four years reported . . . , would not have a different effect on the mind of the viewer since this fact does not affect the gist of the story").

> App.2d 710,714, 59 P.2d 1063, 1064 (1936); *see also* *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 619 (CA9 1980); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 465-466 (CA9 1978). Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander and Related Problems* 138 (1980); *see e.g.*, *Wehling* v. *Columbia Broadcasting System*, 721 F.2d 506, 509 (CA 5 1983); *see generally* R. Smolla, *Law of Defamation* § 5.08 (1991). Our definition of actual malice relies upon this historical understanding.

Id. at 516-17.

The Court of Appeals, in any event, correctly recognized that it had an obligation, imposed by the First Amendment, to conduct an independent examination of the record to determine if petitioners had presented clear and convincing evidence that defendants knew that the gist of the broadcast was false or had serious subjective doubts as to its truth. In order to undertake such an examination, the court was necessarily required to identify what the broadcast conveyed, a task hardly unfamiliar to courts.[14] Far from blurring the issues, as petitioners suggest, Pet. at 14, 20, the Court of Appeals well understood that although the issues of gist and actual malice were subject to separate analysis, where they are (as here) inextricably intertwined, the court cannot determine the latter without first addressing the former. This Court has consistently adopted the same approach. *See Bose* v. *Consumers Union of United*

[14] Both the majority and the dissent in *Bose* emphasized the long history—and the appropriateness—of judicial review of a jury's assessment of challenged speech in not only libel cases but other First Amendment contexts. *Bose*, *supra*, 466 U.S. at 506-07; *id.* at 517 n.1 (Rehnquist, J., dissenting).

States, Inc., 466 U.S. 485, 508 n.27 (1984) ("[R]eview of findings of fact is appropriate 'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' "); *id.* at 506 n.24 (same); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 285 n.26 (same).[15]

The Eleventh Circuit's approach is also entirely consistent with this Court's seminal decision in *New York Times Co.* v. *Sullivan* itself which established both the actual malice test and the doctrine of independent review. Describing the inquiry to be made, the Court held that a court must " '*examine for [itself] the statements in issue* and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . [was designed to] protect.' " *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 285. *Accord Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (same); *Bose*, *supra*, 466 U.S. at 510-11 (same).

Petitioners' answer to all of this is to exclaim repeatedly that the Court of Appeals was required to accept the jury's determination of the "gist." Not only is this contrary to

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[15] As the Court in *Bose* explained:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic . . . into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the trier of fact.

Bose, *supra*, 466 U.S. at 501 n.17

the thrust of petitioners' argument before the Court of Appeals,[16] but it ignores the reality that the jury was never asked to and never did articulate any gist at all. What petitioners are really left to urge is that the jury must be presumed to have agreed with their counsel's *post hoc* articulation of the gist—despite the fact that he offered several at trial[17]—simply because the jury ruled in plaintiffs' favor. As such, the argument apparently goes, the case is closed. The argument is as circular as it is incorrect.

The consequence of petitioners' suggestion would be a complete abrogation of the doctrine of independent review itself. Reviewing courts would be left with a strange task indeed. They would be required first, to search the trial record to see how plaintiffs' counsel articulated the gist or, as in this case, to choose (although it is unclear how) among the many articulations offered by plaintiffs' counsel. A gist having been so chosen, the appellate court

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[16] As the Court of Appeals noted, "[t]he parties in this case agree that we must determine what the report, taken as a whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice." Opinion at 18a n.28.

[17] At one point during closing arguments plaintiffs' counsel insisted that the gist of the report was that Mr. Levan "knew [the transaction] was unfair. He knowingly misled his investors into the transaction, and then he hid from ABC News because he knew he couldn't stand the light of day." R62-4470-71. A short time later, plaintiffs' counsel urged that the "gist of the story" was that "Mr. Levan is hiding from us." R62-4494. Later still, plaintiffs' counsel maintained that the "story was *not* about the transaction; [it] was a character assassination on a good man." R62-4563 (emphasis added). And later still, counsel insisted: "The story was about Alan Levan. The story was about Alan Levan being someone who can't be trusted. The story was about Alan Levan being someone who couldn't sleep at night, someone who can't be trusted with money. And the story was about Alan Levan is a person who is hiding from us." R62-4565-66. Tellingly, petitioners do not urge this Court that the jury adopted any of these articulations of the "gist."

would then presumably search the record to see if there was clear and convincing evidence that defendants had serious doubts as to the truth of counsel's gist. Such a process would risk the most serious dilution of First Amendment rights in libel cases as plaintiffs' counsel routinely seek to conform what they believe is their strongest evidence of actual malice to what they choose to claim on appeal is the gist of what was said. Such a process is certainly not what this Court envisioned in articulating the constitutionally-mandated doctrine of independent review.

II.

THE ELEVENTH CIRCUIT CORRECTLY APPLIED GOVERNING LAW IN CONDUCTING ITS INDEPENDENT REVIEW OF THE EVIDENCE ON THE ISSUE OF ACTUAL MALICE

Petitioners claim that in conducting its independent review of the record on the issue of actual malice, as required by this Court's decisions, the Eleventh Circuit acknowledged that it was venturing into an "unsettled" area of law subject to "some confusion." Pet. at 14. What petitioners neglect to point out is that the Court of Appeals concluded that to the extent the law is unsettled as to how the doctrine of independent review relates to factual findings by the jury, it had no consequence *in this case* because the facts as to ABC's state of mind were overwhelming and undisputed. Opinion at 17a n.27, 20a.

In its opening discussion of the contours of independent review, the Court of Appeals correctly noted that "credibility determinations are reviewed under a clearly erroneous standard because of the jury's ' "opportunity to observe the demeanor of witnesses.' " " Opinion at 17a (quoting *Connaughton* and *Bose*). The court continued:

> Most courts show less deference when factfinding "rel[ies] on weighing of evidence and drawing of inferences." *Newton* v. *National Broad. Co.*, 930 F.2d 662, 671 (9th Cir. 1990); *see also Christ's Bride Ministries, Inc.* v. *Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999). *But see Peter Scalamandre & Sons, Inc.* v. *Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997) (holding no special review is accorded to "preliminary factual issues"). In any event, a *de novo* review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice.

Id. Turning to this case, the court stated:

> We recognize, therefore, that the law is unsettled as to the deference that we give to "facts" found by the jury. In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed: specifically, the overwhelming evidence that ABC had to support the broadcast's conclusion that the rollup was unfair to the limited partners.

Opinion at 17a n.27.

Petitioners also urge that the Eleventh Circuit erred in the method by which it conducted its independent examination of the facts relevant to the actual malice inquiry claiming that this Court's opinion in *Connaughton* required the Court of Appeals to identify facts that the jury "must have found" in order to evaluate actual malice. Pet. at 18. Petitioners' argument ignores the essence of *Connaughton*. *Connaughton* sets forth the appropriate method for determining what credibility determinations the jury must have made in resolving hotly disputed and conflicting testimony as was at issue there. There, after identifying three items of

disputed testimony the jury "must have found" in plaintiff's favor, the Court stated:

> When these findings are considered *alongside the undisputed evidence*, the conclusion that the newspaper acted with actual malice inexorably follows.

Connaughton, *supra*, 491 U.S. at 690-91. Here the undisputed evidence alone demonstrated that ABC did not entertain serious doubts as to the truth of the broadcast.

Petitioners' effort to apply *Connaughton* to the facts here illustrates the pointlessness of the effort. Petitioners' claim that had the Eleventh Circuit not "simply ignored *Connaughton's* guidance," it would have recognized that the jury must have found the following two facts:

> *First*, the jury must have found that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors. *Second*, the jury must have found that, as Mr. Willson admitted, ABC knew that the gist (thus understood) was false. . .

Pet. at 26.[18] Yet this is simply no more than another way of saying that an appellate court has no serious role at all to play in determining whether actual malice has been proved by clear and convincing evidence. Put another way, petitioners' articulation of what the jury "must have found" is simply an end-run around the deeply rooted protections for free expression articulated in *New York Times Co.* v. *Sullivan* itself.

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[18] Petitioners are incorrect in stating that Mr. Willson "admitted" that the gist of the broadcast was false; he did no such thing. In fact, he said quite the opposite. "[Y]es, [the broadcast] was critical of Mr. Levan's deal," Willson testified, "and I wouldn't have put it on the air if I didn't believe that there were reasons to be critical of the deal." R43-1854-55.

To be sure, *Connaughton* did indeed provide "guidance"—dispositive guidance, as it turned out—to the Court of Appeals. The court put it this way:

> In *Connaughton,* the newspaper used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe. *See id.* at 691-92, 109 S.Ct. at 2697-98. According to the source, the candidate had offered her and her sister a bribe (in the form of employment) during a conversation in his home at which five other people were present. Before it published the story, the newspaper spoke with the candidate, who had tape recorded the conversation, and the five other witnesses, all of whom squarely contradicted the source. The newspaper, however, neglected to listen to the tape recording, which the candidate made available. It also neglected to contact the source's sister, whom the source said would corroborate her version of the event. Under these facts, the Supreme Court held that the plaintiff had met his burden of establishing actual malice by clear and convincing evidence. *See id.* at 691-93, 109 S.Ct. at 2697-99.
>
> The instant case is precisely the opposite of *Connaughton*. ABC had numerous sources telling it that the rollups were grossly unfair for the limited partners. *See Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Connaughton* on the ground that the article at issue was supported by the "overwhelming number of sources"). Given these sources, ABC was not required to continue its investigation until it found *somebody* who would stand up for Levan. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir.1992). The law only required that ABC not proceed to publication while entertain-

> ing "serious doubts" as to the truth of the broadcast. *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325.

Opinion at 24a-25a.

Finally, petitioners launch an effort to identify what the jury "could have found"—the very standard rejected by the majority in *Connaughton*, 491 U.S. at 690,—and offer a laundry list of credibility determinations the jury "could have made." Pet. at 26-27. Although most of the proffered facts have little or no relevance to the issue of whether ABC knew that the gist of the broadcast was false, even if one were to assume that each of them was "found" by the jury, they cannot begin to outweigh the avalanche of information that ABC had learned from *all* disinterested observers of the transaction that the transaction was egregiously unfair, so much so, in the words of the Court of Appeals, that a viewer would believe Levan and BFC must have known that it was. *See* pp. 7-14, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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